

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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NIHAL ERKAN, on behalf of herself and all
Others similarly situated,

Docket No. 23-cv-09553

Plaintiffs,

-against-

**REPLY AFFIDAVIT
IN SUPPORT**

DAVID A. HIDALGO, M.D., P.C.,

Defendant.

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BRANDON SHAW, being duly sworn, deposes and states:

1. I am over 18 years of age and competent to make this declaration, which I make based on my personal knowledge. I further make this statement in support of Defendant's motion to dismiss the First Amended Complaint in the above-referenced matter.
2. As stated in my prior Affidavit in support of this motion, I graduated from Brigham Young University-Idaho in 2010 with a degree in Information Systems. I have 15 years' experience as a Web Developer. I have been employed by Advice Media, which is a website design, development, and management company, specializing in the medical and dental fields, as the Director of Product Development, a position I have held since 2014
3. I have reviewed the Declaration/Report of Robert D. Moody in opposition to the Defendant's Motion to Dismiss. Mr. Moody is an alleged "expert" hired by the Plaintiff to respond to the instant motion. The following is my response to that Declaration.
4. As stated in my original Affidavit in Support of the Defendant's motion,

Defendant's website utilizes AccessiBe, which is a computer application developed and marketed by a firm called Accessible, to assist in making its website ADA compliant.

5. Defendant's website (www.drdavidhidalgo.com) was built on an accessible framework that addresses the majority of compliance requirements. However, some exceptions still require additional improvements. To address these, AccessiBe has been integrated as an extra layer of assurance to catch any missed exceptions.
6. AccessiBe is an AI-powered service that operates between the website user and the web server, automatically enhancing accessibility by identifying and modifying code before it reaches the end user. It scans the site, makes adjustments using artificial intelligence, and provides an interface for users to customize their experience, thereby enhancing compliance with accessibility standards.
7. The issue with Mr. Moody's report lies in the method used to execute the scan. Mr. Moody states, in Paragraph "20" of his Affidavit, that he used tools provided by a website, Deque.com, as part of his audit. However, unlike a human website visitor, the scan tool that Mr. Moody used made a direct computer-to-computer connection to the website server, thus bypassing the AccessiBe service and excluding the additional accessibility enhancements that that service provides.
8. Scan tools such as that used by Mr. Moody are unable to determine accessibility compliance on websites on which AccessiBe is installed, due to

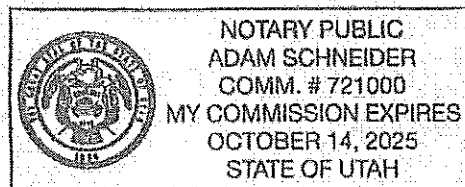
the fact that they test a server's output, rather than an actual browsing session in which AccessiBe is turned on and a user profile is elected. Thus, the tool ignores any changes made to a website at the browser level (which is what AccessiBe does) and tests the site as if AccessiBe is not there. These tools cannot recognize these browser/client side remediations because they are not browsers and do not use a browser.

9. Sight-impaired and blind users use "screen-readers" that AccessiBe automatically integrates with, and provides adjustments for. Testing tools like that used by Mr. Moody do not act like actual users that interact with websites, nor are they screen-readers, so AccessiBe does not provide them with accessibility modifications.
10. For those reasons, Mr. Moody's report misrepresents what a real-world user would experience, because it circumvents the crucial layer of accessibility support offered by AccessiBe. Thus, the "test" run by Mr. Moody is, in a word, useless.


BRANDON SHAW

Sworn to before me this 30
day of August, 2024.


NOTARY PUBLIC



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Others similarly situated,

Plaintiffs,

-against-

DAVID A. HIDALGO, M.D., P.C.,

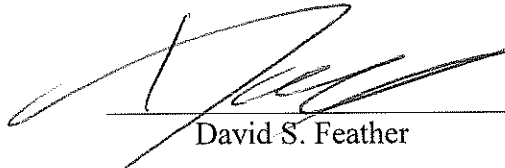
Defendant.

REPLY AFFIDAVIT IN SUPPORT

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Pursuant to 22 NYCRR 130-1.1, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, the contentions contained in the annexed document are not frivolous.

Dated: September 4, 2024



David S. Feather